

MOTION TO ADMIT EVIDENCE UNDER RULE 404(B), ARIZONA RULES OF EVIDENCE:

The defendant's telephone call from jail could be admitted to show consciousness of guilt and also as another act under Rule 404 (b), Ariz. R. Evid.

The State of Arizona, by and through undersigned counsel, requests this Court to admit evidence under Rule 404 (b), Ariz. R. Evid. The State's motion is based upon the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Facts:

While incarcerated in jail awaiting trial, the defendant contacted Cory Black by phone and attempted to suborn his testimony. The State intends to introduce this evidence to show consciousness of guilt and under Rule 404(b), Ariz. R. Evid.

Argument:

Defendant argues that because his attempt to get Cory Black to change his testimony represents a consciousness of guilt, it may not also be admitted under Rule 404(b). This argument is meritless.

Law:

A. The "other acts" evidence is admissible under Rule 404(b).

Other acts do not have to be criminal in nature to be admissible under Rule 404(b). *State v. Castaneda*, 150 Ariz. 382, 391, 724 P.2d. 1, 10 (1986). In *Castaneda*, the State introduced evidence that the defendant had asked another young boy if he and a friend would like to earn some money doing yard work. This act was not criminal in nature, but was introduced to show identity and the

same pattern of behavior the defendant used in luring the homicide victim and his friend into defendant's car.

In *State v. Robinson*, 165 Ariz. 51, 796 P.2d 853 (1990), the State introduced evidence that on two separate occasions the defendant went to where his girlfriend was staying and forced her to return with him. The State introduced this evidence to explain why he went to the girlfriend's house, looking for her in order to get her back. Instead, because she was not there, he killed her parents.

Here, even if this Court construed the telephone call as a bad act and offered as consciousness of guilt, it is still admissible under the rule. In *State v. Williams*, 183 Ariz. 368, 904 P. 2d 437 (1995), the defendant tried to rob and kill a woman because she was implicating him in a murder. Evidence of the attempted robbery and murder was held relevant at the murder trial because it showed defendant's consciousness of guilt (trying to eliminate witnesses) and possibly gave an alternative explanation for the shooting.

B. Defendant had no reasonable expectation of privacy in his monitored jail telephone calls.

The defendant argues that intercepting his telephone calls from the jail violated his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article II, Sec. 8 of the Arizona Constitution. However, to show a violation of his constitutional rights, the defendant must show, not only that he had a subjective expectation of privacy, but also that his expectation is one that society would consider reasonable. *State v. Duran*, 183 Ariz. 167, 901 P.2d 1197 (App. 1995); *Smith v. Maryland*, 442 U.S.

735, 740, 99 S.Ct. 347, 361 (1979), *quoting Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967).

Here, Madison Jail personnel informed the defendant that his telephone calls would be monitored. In addition, a message preceding each call informed both the caller and the person called that the telephone call would be monitored. In addition, a sign was posted near the telephone advising jail inmates that all telephone calls from the jail would be monitored. Thus, any subjective expectation of privacy that the defendant may have had was not reasonable.

Case law is clear that taping of inmates' conversations does not violate a defendant's right to be free from unreasonable searches and seizures, nor is it a violation of the wiretap law. *State v. Hauss*, 142 Ariz. 159, 688 P.2d 1051 (App. 1984); *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977) *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed. 2d 90 (1978).

In *Hearst, supra*, the Court reasoned that the monitoring and recording of prisoner-visitor conversations did not violate the Fourth Amendment when done to maintain prison security. Further, there was no violation of a defendant's Sixth Amendment right to the assistance of counsel because there was no interrogation, either formally or surreptitiously, by the government.

Likewise, in *Hauss* the Court found no Fourth, Fifth, or Sixth Amendment violations from taped jail conversations. Relying on *Hearst, supra*, the Court found:

1. The defendant was aware that his conversations would be monitored and impliedly consented to the recording;

2. The person with whom the defendant spoke was not an agent of the state;
3. There was no government interrogation, nor were the statements elicited by a functional equivalent of governmental interrogation or government conduct;
4. The monitoring was a reasonable means of maintaining security at the police station;
5. Any expectation of privacy was outweighed by the need to maintain security; and
6. The statements were not obtained in violation of any constitution or statute.

In *Duran, supra*, the defendant's conversation was intercepted during her cordless telephone call. The Appellate Court held that because she was placed on notice that her phone calls could be overheard, her expectation of privacy was not reasonable.

Here, the defendant had knowledge that his calls were being monitored, not only by the posted signs but also by the jail personnel. The recipients of each of his calls were also apprised that if they accept the charges, they consent to the recording of the conversations. Monitoring calls is a reasonable means of maintaining security at the jail. There was no violation of any of the defendant's constitutional rights or statute, and he is not entitled to any relief.

C. Foundation

Because the State is offering this taped recording as real evidence, the State bears the burden of proving that the recording is what it purports to be.

Rule 901(a), Ariz. R. Evidence, provides:

- (a) The requirement of authentication or identification as a condition precedent to

admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Rule 901(b) illustrates some of the ways that evidence may be authenticated. Rule 901(b)(6) states that telephone conversations may be authenticated by “evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called “

Rule 901(a) governs the evidentiary foundational requirements. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Pursuant to the Rules of Evidence, the judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic. *State v. Irving*, 165 Ariz. 219, 707 P.2d 1237 (App. 1990). This determination is left to the sole discretion of the trial judge. *State v. Romanosky*, 162 Ariz. 217, 224, 782 P.2d 693, 700 (1980).

The State may establish the authenticity of the recording by presenting the person in charge of monitoring the telephone calls, Yolanda Varela. Ms. Varela is the person who can identify and authenticate the original tape. She will explain the normal procedure used to monitor the phone calls, the accuracy and correctness of the system, and the fact the system cannot be tampered with. *U.S. v. O'Connell*, 841 F. 2d 1408 (8th Cir. 1988). See also *State v. Johnson*

[Buccola, Real Party in Interest], 184 Ariz. 521, 911 P.2d 527 (App. 1994). Ms. Varela will further testify that a computer monitors and records the date and time that a call is placed, the number to which the call is placed, the identity of the inmate making the call, whether the call was accepted, and the length of the call. She will also testify that the recordings are maintained by the dates on which the calls were made. The system prevents any tampering or alteration of the recorded messages. In addition, Ms. Varela will be able to testify that when this tape recording is released to any police agency, the officer receiving signs for it or obtains a copy. The officer can only copy the tape -- he cannot alter it.

Investigator Paul Orfe testified as to what evidence he had received from Ms. Varela, plus the date and the procedure he employed in making a duplicate of the original recording. *State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.2d 1260 (1990); *State v. Romanosky, supra*. He testified as to the accuracy of the duplication. Rule 1001 (4), Ariz. R. Evid.

Pursuant to Rule 901 (5), Ariz. R. Evid., Detective Potter will be able to identify the defendant's voice, as well as the voice of Cory Black, because he is personally familiar with each of their voices. *State v. Silva*, 137 Ariz. 339, 670 P.2d 737 (App. 1983), *cert. denied*, 464 U.S. 999 104 S.Ct. 500 (1983).

In conclusion, the State can establish that the tapes are authentic, and the tapes do not violate any of the defendant's constitutional rights. Therefore, the tapes should be admitted into evidence.